

# Terms of Engagement

## 1. Recital of Appointment

Terms of Engagement of *Charles James Shaw-Smith*

*NN* has appointed *Charles James Shaw-Smith* to render advice and services in accordance with these Terms of Engagement.

### Parties to the contract

Appointment of *Charles James Shaw-Smith* as an Expert in the matter of:

**N vs N**

Agreement made [**date**] between **NN** (hereinafter called the Appointor) and *Charles James Shaw-Smith* (hereinafter called the Expert) of *Royal Devon and Exeter NHS Foundation Trust (Heavitree site)*.

As witness the hands of the parties

I am duly authorised to sign this contract for and on behalf of

Signature of the Appointor .....

Signature of the Expert .....

## **2. Definitions**

Unless the context requires otherwise:

- a. 'Appointor' means the solicitor instructing the Expert.
- b. 'Expert' means the person appointed to provide advice and services, which may include the giving of expert evidence.
- c. 'Client' means the person(s), firm, company or public body on whose behalf the Expert is being instructed.
- d. 'Assignment' means the matter(s) referred to the Expert for advice to which these Terms of Engagement apply.
- e. 'Fees' mean (in the absence of written agreement to the contrary) the reasonable charges of the Expert based on his or her normal hourly/daily rate for work of the type instructed and including VAT where applicable.
- f. 'Disbursements' mean all reasonable and appropriate costs and out-of-pocket expenses incurred by the Expert in carrying out the Assignment, including travel, refreshments and, should an overnight stay become necessary, hotel accommodation. VAT will be charged where applicable.

## **3. The Instructions**

The Appointor will:

- a. provide the Expert with full and timely written instructions which clearly state:
  - i. whether the Expert is being instructed on the Appointor's own behalf or that of one of the parties to the dispute or as a Single Joint Expert
  - ii. the purpose for which the Expert's advice and services are needed, including a description of the matter on which they are being sought
  - iii. which factual aspects of the matter may be in dispute
  - iv. whether the advice and services are to be provided in accordance solely with information supplied or will require independent investigation by the Expert
  - v. the precise kind of expertise called for
  - vi. the particular questions that are to be addressed
  - vii. whether the Expert will be expected to confer with experts instructed on behalf of other parties with a view to reaching agreement on the issues or narrowing those in dispute
  - viii. whether the Expert is to prepare a report for the advice of the Appointor and/or his Client or for use in court, and, if the latter, whether a draft version needs to be submitted first of all
  - ix. any time constraints for the provision of the advice, the production of the report, etc.
- b. provide the Expert with such basic additional information as names, addresses, telephone numbers and dates of incidents.
- c. supply the Expert with good-quality copies of all relevant documents.
- d. in the case of medical records, specify their location and identifying numbers and state whether consents for their disclosure have been given or are being obtained.

## **4. Obligations of the appointor**

The Appointor will:

- a. inform the Expert by whom his or her fees are to be paid and whether the Appointor needs to obtain authority to incur the estimated fees and disbursements before confirming the Expert's instructions.
- b. in legal aid cases:
  - i. notify the Expert that a funding certificate or legal aid order has been applied for, granted or amended
  - ii. apply to the Legal Services Commission for prior authority to incur the Expert's anticipated fees and disbursements and immediately advise the Expert should this authority be refused
  - iii. apply to the Legal Services Commission for interim payments on account to settle the Expert's invoices within the agreed time scale.
  - iv. determine, as part of the preliminary or protocol enquiries, whether Legal Services Commission criteria for exceeding the benchmark rates for fees apply. The benchmark rates will only apply in the event that the Expert's evidence is not key to the Client's case and where the instructions and material to consider are neither complex nor specialist in nature.
  - v. for attendance at court in criminal proceedings, aid the Determining Officer in the exercise of his or her discretion on payment of fees by advising of the nature and complexity of the case, any factors limiting the availability of experts, the status of the expert and the Expert's charging rates for preparation, attendance and cancellation and will notify the Expert of the court address and details for the purpose of invoicing.
- c. in privately funded cases ensure that the Expert's fees and disbursements are paid within the agreed time scale, whether or not the Appointor has been placed in funds by the Client.
- d. respond promptly to any reasonable request from the Expert for, *i.a.*:
  - i. clarification of instructions already given
  - ii. further information or documents
  - iii. permission to incur expense additional to that initially estimated
  - iv. authority to engage others to undertake part of the assignment.
- e. not alter, or allow others to alter, the text of the Expert's report(s) in any way without the Expert's permission.
- f. give prompt written warning of every meeting or hearing that the Expert is, or may be, required to attend and immediate notification should they be cancelled.
- g. keep the Expert informed as to the progress of the case and its outcome.
- h. not use, or allow others to use, the Expert's report(s) for any purpose other than litigation in the matter on which the Appointor has sought the Expert's advice and services.

The Appointor's instructions are accepted by the Expert only upon the basis that the Appointor gives to the Expert full, timely and proper instructions, authority and information which will enable the Expert to lawfully and properly carry out the assignment and comply with the Expert's duty to the court, and that the Appointor will indemnify the Expert accordingly.

## **5. Obligations of the expert**

If the Expert is required to provide expert evidence, he or she becomes subject to the provisions of the court's Procedure Rules that relate to experts. In such circumstances the Expert's primary duty would be to the Court and his or her evidence must be seen to be independent, objective and having no bias towards the party responsible for paying his or her fees. Subject to these overriding considerations, the Expert will:

- a. at all times, both during and after completion of the Assignment, adhere to professional boundaries of confidentiality, and raise with the Appointor any

- conflict between professional boundaries and Appointor instructions, if it becomes apparent.
- b. perform only those tasks for which he or she has the requisite qualifications and experience to undertake, and the resources needed to adequately fulfil them within the allotted time span.
  - c. keep detailed time-sheets and records of tasks undertaken.
  - d. promptly notify the Appointor of:
    - i. any conflict of interest that would disqualify the Expert or render it undesirable for the Expert to have continued involvement with the case
    - ii. any requirement the Expert perceives for the Appointor to employ additional expertise.
  - e. endeavour to make him or herself available for all hearings, meetings or other necessary engagements for which he or she has received adequate notice.
  - f. not negotiate with the opposing party or their advisers unless specifically authorised to do so by the Appointor or instructed to do so by order of the Court.
  - g. if requested by the Appointor, provide before the hearing full and complete details of his or her costs to trial
  - h. not without good cause discharge himself or herself from the appointment as Expert.
  - i. at all times, both during and after completion of the Assignment, treat all aspects of it as confidential unless authorised by the Appointor to the contrary.

## **6. Intellectual property rights**

- a. Unless otherwise agreed in writing, all legal and beneficial interest in intellectual property rights and rights of ownership in written reports, photographs, recordings, models and other original work created by the Expert relating to or developed by him or her in connection with the assignment given by the Appointor shall belong to the Expert.
- b. The Expert grants to the Appointor a non-exclusive, non-transferable licence to use the said intellectual property solely in connection with the assignment to which the instructions relate and for the duration of these terms of engagement but subject to clause (f) of the *Fees and disbursements* section.
- c. The Expert shall not be liable for use of the Material for any purpose other than that for which it was prepared and/or provided.

## **7. Fees and disbursements**

In the absence of any written agreement to the contrary:

- a. the Appointor who instructs the Expert does so as principal and shall be personally responsible for payment of the Expert's fees and disbursements, whether or not the Appointor has been placed in funds by the client (or, in legal aid cases, by the Legal Services Commission), and the Appointor shall pay them in full, notwithstanding any provisions of the court's Procedure Rules with regard to their amount, recoverability or otherwise, and whether or not the full amount has been allowed in any assessment of the costs of the case.
- b. Fees will be charged on a time costed basis at the Expert's hourly rate from time to time applicable and notified in writing by the Expert to the Appointor unless a fixed fee or some other basis of charging is agreed in advance and in writing between the Expert and the Appointor.
- c. The Expert may present interim invoices at such intervals as he or she considers fit and payment of each invoice will be due within *28 days* of its presentation, subject to any written waiver granted by the Expert in legal aid cases.
- d. The Expert reserves the right to charge to the Appointor the costs and expenses (including legal costs) of recovering late payments and to charge interest at the

rate then in force pursuant to the Late Payment of Commercial Debts (Interest) Act 1998.

- e. If the Appointor does not make payment when due the Expert may, in addition, modify the payment terms so as to make all fees and disbursements payable in advance or require the Appointor to give such assurance, guarantee or undertaking as the Expert may reasonably require to secure the Appointor's payment obligations.
- f. Until payment in full has been made by the Appointor the Expert shall be entitled to retain all books, papers, reports, documents and other materials, whether or not these are the property of the Appointor and whether or not they relate to the assignment in respect of which the Expert has been instructed.

## 8. Cancellation fees

The Expert shall be entitled to charge fees whenever:

- a. the Expert's time has been reserved for a specific hearing, meeting or other engagement, or
- b. specific instructions have been given to the Expert for an investigation and report and due to settlement of the matter, or for any other reason not the fault of the Expert, the reservation of time has been cancelled or the instructions withdrawn.

These fees will be calculated according to the following sliding scale:

* Cancellation/withdrawal of instructions...	% of agreed fee
within <b>28</b> days of the hearing/date arranged for investigation/date report required, etc.	25
within <b>14</b> days of the hearing/date arranged for investigation/date report required, etc.	50
within <b>7</b> days of the hearing/date arranged for investigation/date report required, etc.	100

## 9. Disputed fees

In the event of a dispute over the amount of the Expert's fees or disbursements, such sums that are not disputed shall be payable when due, irrespective of any counterclaim that may be alleged. That part which is in dispute can then be referred for resolution to a mediator acceptable to both parties or, if agreement cannot be reached, by using the services of the Centre for Dispute Resolution. In the event that the dispute is not resolved by means of negotiation or mediation, the Courts of England and Wales will have exclusive jurisdiction in relation to the dispute and its resolution.

## 10. Insurance

The Expert shall take out and maintain professional indemnity insurance for an amount of *£No limit for each and every claim* for a period beginning on the date of this

agreement and ending six years after the date of completion of the Services, provided that such insurance is available at commercially reasonable rates and terms. The Expert shall take out and maintain that professional indemnity insurance:

- a. with reputable insurers lawfully carrying on insurance business in the UK;
- b. on customary and usual terms and conditions prevailing for the time being in the insurance market; and
- c. on terms that:
  - i. do not require the Expert to discharge any liability before being entitled to recover from the insurers; and
  - ii. would not adversely affect the rights of any person to recover from the insurers under the Third Parties (Rights Against Insurers) Act 1930.

## **11. Limitation of Liability**

Without affecting any other limitation in this agreement, the Expert's liability under or in connection with this agreement, however that liability arises (including a liability arising by breach of contract, arising by tort, including the tort of negligence, or arising by breach of statutory duty), shall be limited to *£No limit for each and every claim*, provided that this clause shall not exclude or limit any liability of the Expert for death or personal injury caused by the Expert's negligence.

## **12. Liability Period**

The Client may not commence any legal action against the Expert under this agreement after six years from the date of completion of the Services.

## **13. Third Parties**

These terms of engagement set out the rights and obligations of the Appointor and the Expert only. For the purposes of the Contracts (Rights of Third Parties) Act 1999, nothing in these terms shall be taken to confer or purport to confer any right or benefit on any third party and a third party shall have no right to the enforcement of any term contained herein.

## **14. Termination**

- a. The Appointer may terminate the whole or any part of the Expert's engagement under this agreement at any time by giving ten Business Days' notice in writing to the Expert.
- b. Either party may immediately terminate the other's engagement under this agreement by giving written notice to the other party if:
  - i. the other party is in material breach of its obligations under this agreement and fails to remedy that breach within ten Business Days of receiving written notice requiring it to do so; or
  - ii. the other party becomes Insolvent.

## **15. Entire Agreement**

- a. This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous drafts, agreements, arrangements and understandings between them, whether written or oral, relating to its subject matter.

- b. Each party acknowledges that in entering into this agreement it does not rely on, and shall have no remedies in respect of, any representation or warranty (whether made innocently or negligently) that is not set out in this agreement.
- c. No party shall have any claim for innocent or negligent misrepresentation based upon any statement in this agreement.
- d. Nothing in this clause shall limit or exclude any liability for fraud.

## **16. Governing Law and Jurisdiction**

- a. This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.
- b. The parties irrevocably agree that subject to clause 9 hereof the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).